No. 89-1555

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

MARK E. DENNIS,

Petitioner,

v.

MARGARET L. HIGGINS, DIRECTOR,
NEBRASKA DEPARTMENT OF MOTOR VEHICLES, *et al.*,

Respondents.

On Writ of Certiorari
to the Supreme Court of Nebraska

BRIEF OF PETITIONER

RICHARD A. ALLEN
Counsel of Record
KENNETH S. NANKIN
ZUCKERT, SCOUTT & RASENBERGER
888 Seventeenth Street, N.W.
Suite 600
Washington, DC 20006
202/298-8660

RICHARD L. SPANGLER, JR.
WOODS & AITKEN
1500 American Charter Center
206 South 13th Street
Lincoln, NE 68508
402/474-0321

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

QUESTION PRESENTED

Whether a claim that a state tax discriminates against interstate commerce in violation of the Commerce Clause and that seeks an injunction against enforcement of the tax is cognizable under 42 U.S.C. § 1983.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Table of Authorities Continued

Table of Authorities Continued

Table of Authorities Continued

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-1555

MARK E. DENNIS,

Petitioner,

v.

MARGARET L. HIGGINS, DIRECTOR,
NEBRASKA DEPARTMENT OF MOTOR VEHICLES, *et al.*,

Respondents.[1]

On Writ of Certiorari
to the Supreme Court of Nebraska

BRIEF OF PETITIONER

OPINIONS BELOW

The opinion of the Supreme Court of Nebraska (Pet. App. 1a-27a) is reported at 234 Neb. 427, 451 N.W.2d 676 (1990). The opinion of the District Court of Lancaster County (Pet. App. 28a-30a) is not reported.

---

[1] Petitioner is Mark E. Dennis. Respondents are the following officials of the State of Nebraska: Margaret L. Higgins, Director, Nebraska Department of Motor Vehicles, Gerald C. Strobel, Director, Nebraska Department of Roads, and Frank Marsh, Nebraska State Treasurer. Respondents are successors in office to other officials whom petitioner sued in their official capacities for injunctive relief.

The judgment of the District Court of Lancaster County denying petitioner's motions for class certification and preliminary injunction is set forth at Pet. App. 31a-35a.

JURISDICTION

The judgment of the Supreme Court of Nebraska was entered on February 16, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 1983 provides, in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

The Commerce Clause of the United States Constitution, Article I, Section 8, Clause 3, provides:

> The Congress shall have Power . . .
>
> . . .
>
> To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

Pertinent provisions of Nebraska's retaliatory tax statute, Nebraska Rev. Stat. § 60-305 (Reissue 1984), are set forth at Pet. App. 36a-37a.

STATEMENT

In this case, petitioner filed a class action suit in a Nebraska state court on December 17, 1984 challenging the constitutionality of certain "retaliatory taxes" that the State of Nebraska imposed on motor carriers, including petitioner, who operated trucks in Nebraska that were registered in certain other states. The Supreme Court of Nebraska affirmed a trial court decision declaring that Nebraska's retaliatory taxes violated the Commerce Clause of the United States Constitution, but it held that this violation did not deprive petitioner of personal constitutional "rights" and therefore did not entitle petitioner to relief under 42 U.S.C. § 1983 or to litigation costs and attorney's fees under 42 U.S.C. § 1988.

A. Nebraska's Retaliatory Taxes

Nebraska, like most other states, imposes a variety of fees and taxes on motor carriers operating in the State, such as fees for the registration of vehicles and taxes for the use of fuel in the state. In addition, until it was recently amended, Neb. Rev. Stat. § 60-305 (Reissue 1984) authorized respondents, various state officials, to levy additional taxes, commonly known as "retaliatory taxes," which were imposed only on carriers operating vehicles in Nebraska that were registered in certain other states and were not imposed on Nebraska-registered vehicles (Pet. App. 36a-37a). The purpose of § 60-305 was to retaliate against states imposing so-called "third structure

taxes,"[2] which certain states have imposed on all motor carriers operating in those states, including Nebraska-registered carriers, and to which Nebraska objected. Section 60-305 carried out this purpose by authorizing respondents to impose taxes on carriers registered in those states that operate in Nebraska which taxes are equal in amount to the third structure tax imposed by the carriers' state of registration. By thus penalizing carriers from third structure tax states, Nebraska's legislature hoped to pressure the legislatures of those states to repeal their third structure taxes or exempt Nebraska-based carriers from them.

Respondents implemented § 60-305 by imposing retaliatory taxes on carriers whose vehicles were registered in nine states: Arizona, Arkansas, Idaho, Nevada, New York, Ohio, Oregon, Pennsylvania and Wyoming. (Pet. App. 22a).

---

[2] A "third structure tax" is one that is imposed on motor carriers in addition to the more traditional charges states have levied on such carriers, which are registration fees and fuel taxes (so-called "first" and "second structure" taxes). Examples of third structure taxes include ton-mile taxes, which are based on the weight of trucks and the mileage operated in the taxing state, and axle taxes, which impose a flat charge based on the number of axles on each vehicle. In *American Trucking Associations, Inc. v. Scheiner*, 483 U.S. 266 (1987), this Court invalidated one such third structure tax, Pennsylvania's axle tax. The Court noted that flat taxes like Pennsylvania's had prompted Nebraska and six other states to enact retaliatory taxes, and it stated: "Such taxes can obviously divide and disrupt the market for interstate transportation services." *Id.* at 285 (footnotes omitted).

B. Proceedings Below

Petitioner Mark E. Dennis, doing business as Dennis Trucking, is a motor carrier residing in Royalton, Ohio, who began operating in 1978 with one truck. Petitioner and his wife now own and operate four tractors and six trailers in several states, including Nebraska. His tractors are registered in Ohio, which imposes a two cents per mile third structure tax. Petitioner was therefore subject to and paid Nebraska's retaliatory tax (J.A. 149, 150).

Petitioner filed a complaint in a Nebraska state court on December 17, 1984 as a class action seeking injunctive and declaratory relief and refunds (J.A. 5).[3]

---

[3] Petitioner was joined as a plaintiff in his original complaint by the Private Truck Council of America, Inc. ("PTCA") (now the National Private Truck Council, Inc.), a trade association of private motor carriers, many of whose members were subject to Nebraska's retaliatory tax. The trial court, however, dismissed PTCA as a plaintiff on the ground that it lacked standing because it was not itself subject to the tax (Pet. App. 33a).

PTCA and other motor carriers that were subject to retaliatory taxes had filed suits in December 1984 and January 1985 against Nebraska and the six other states that had enacted retaliatory motor carrier taxes, Maine, New Hampshire, New Jersey, Georgia, Florida, and Oklahoma. Each of those actions has resulted in final state court decisions invalidating the taxes. *Private Truck Council of America, Inc. v. Sec'y of State*, 503 A.2d 214 (Me.), *cert. denied*, 476 U.S. 1129 (1986); *Private Truck Council of America, Inc. v. New Hampshire*, 128 N.H. 466, 517 A.2d 1150 (1986); *Private Truck Council of America, Inc. v. New Jersey*, 221 N.J. Super. 89, 534 A.2d 13 (N.J. Super. Ct. App. Div. 1987), *aff'd*, 111 N.J. 214, 544 A.2d 33 (1988); *Georgia v. Private Truck Council of America, Inc.*, 258 Ga. 531, 371 S.E.2d 378 (1988); *Private Truck Council of America, Inc. v. Florida Department of Revenue*, 531 So.2d 367 (Fla. Dist. Ct. App. 1988);

The complaint alleged that Neb. Rev. Stat. § 60-305 (Reissue 1984) discriminated on its face against interstate commerce and out-of-state residents in violation of the Commerce Clause and the Privileges and Immunities Clause of Article IV, Section 2 of the United States Constitution (*id.* at 11). It also alleged that the respondents were therefore liable to petitioner under 42 U.S.C. § 1983 (*id.* at 12). Upon filing his complaint, petitioner moved for a preliminary injunction or, alternatively, for an order requiring the tax collections to be held in escrow pending the outcome of the suit.[4]

The trial court denied petitioner's motion for a preliminary injunction or an escrow order and his motion for class certification (Pet. App. 35a). After a hearing on stipulated facts, the trial court, on September 30, 1987, issued a decision declaring the challenged taxes unconstitutional as an unlawful burden on interstate commerce in violation of the Commerce Clause. The court concluded: "On their face said taxes and fees discriminate against interstate commerce" (*id.* at 29a). Accordingly, it permanently enjoined respondents from assessing, levying or collecting the taxes (*id.* at 30a). The court, however, denied without explanation petitioner's claim under 42 U.S.C. § 1983 (*id.*).

With respect to the entitlement of petitioner and other taxpayers to refunds, the court held that all taxpayers would have to file claims for refunds with

---

Private Truck Council of America, Inc. v. Oklahoma Tax Commission, No. 68,401 (Okla. June 28, 1990).

[4] Escrow orders have often been issued in suits of this kind. Justice Blackmun issued such an order in *American Trucking Associations, Inc. v. Gray*, 483 U.S. 1306, 1310 (1987).

the Nebraska Department of Administrative Services (Pet. App. 30a). The court also held that petitioner and his attorneys would be entitled to payment of their costs and attorney's fees under the equitable "common fund" doctrine, but it denied without comment their request for a determination that the pertinent common fund would be all the taxes that would be subject to refund as a result of the court's judgment (*id.*). Since petitioner had paid less than $100 in taxes[5] and since his motion to proceed as a class action had been denied, the court effectively held that there was no common fund from which litigation expenses and attorney's fees could be recovered.

Petitioner appealed the denial of his claim under 42 U.S.C. § 1983 and the denial of his claim regarding the composition of the common fund. Respondents did not cross-appeal the trial court's invalidation of the tax but did cross-appeal its ruling—albeit a meaningless one—that there was any common fund entitlement to fees and expenses.

On February 16, 1990, the Nebraska Supreme Court affirmed the trial court's denial of petitioner's claim under 42 U.S.C. § 1983, but reversed its holding that petitioner and his attorneys had even a theoretical right to recover fees and expenses under the common fund doctrine (Pet. App. 1a-27a). On the latter point, the court held that there was no such right because there was no fund, inasmuch as class certification had been denied and refunds to taxpayers would depend

---

[5] The parties stipulated that petitioner paid a total of $52.60 in retaliatory taxes to Nebraska in 1983 and 1984, the only years covered by the stipulation (J.A. 150).

on the filing of individual refund claims and on case-by-case determinations of their merits (*id.* at 23a-27a).

With respect to petitioner's claim under 42 U.S.C. § 1983 the court held:

> Despite the broad language of § 1983 and the fact that there appears to be a division of authority on the question as to whether there is a cause of action under § 1983 for violations of the commerce clause, we believe the better reasoned cases hold that there is no cause of action under § 1983 for violations of the commerce clause.

(Pet. App. 5a). The court relied primarily on *Consolidated Freightways Corp. v. Kassel*, 730 F.2d 1139, 1144 (8th Cir.), *cert. denied*, 469 U.S. 834 (1984), which held that "the Commerce Clause does not establish individual rights against government, but instead allocates power between the state and federal governments."

SUMMARY OF ARGUMENT

The Nebraska Supreme Court erred in holding that there is no cause of action under 42 U.S.C. § 1983 for violations of Article I, Section 8, Clause 3 of the federal Constitution, the Commerce Clause.

1. Section 1983 provides a remedy for the "deprivation of *any* rights, privileges, or immunities secured by the Constitution and laws" (emphasis supplied) by a person acting under color of a state statute, ordinance, etc. As this Court has consistently held, the plain language and legislative history of § 1983 establish that it provides a remedy for state deprivations of *all* federal constitutional and statutory

rights and is not limited to some subset of such rights. *See, e.g., Golden State Transit Corp. v. City of Los Angeles*, 110 S. Ct. 444 (1989); *Maine v. Thiboutot*, 448 U.S. 1, 4 (1980). Contrary to this Court's consistently broad construction, the decision below would carve an exception for certain types of constitutional violations from the coverage of § 1983. No such exception is warranted. Congress has not chosen to restrict in any way the coverage of § 1983 despite this Court's longstanding interpretation of the statute. On the contrary, the only change Congress has made to § 1983 since its original enactment was to amend it in 1979 to broaden its scope. Accordingly, creating new exceptions to the scope of the statute should be left to Congress. *See, e.g., Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 58 U.S.L.W. 4862 (1990).

2. There is no merit to the Nebraska Supreme Court's view that the Commerce Clause does not establish individual rights but only allocates powers among state and federal governments. This Court's decisions make clear that many constitutional provisions which allocate powers among governmental entities also give rise to rights which individuals can enforce judicially. Virtually throughout its history, the decisions of this Court have established beyond question that the Commerce Clause not only restricts the power of the states but also, in so doing, secures rights, which individuals can enforce through the courts, to engage in commerce and travel among the states free of discriminatory state laws and taxes. *See, e.g., Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318, 320 n.3 (1977) (stock exchanges could assert "their right under the Commerce Clause to engage in interstate commerce free of dis-

criminatory taxes"); *Morgan v. Virginia*, 328 U.S. 373, 376-377 (1946) (individual had standing to invoke the Commerce Clause in her challenge of a state statute requiring racial segregation on interstate buses). The ruling of the Nebraska Supreme Court cannot be reconciled with this Court's Commerce Clause jurisprudence.

3. Contrary to the decision below, whether a constitutional or statutory provision establishes a personal right cognizable under § 1983 does not turn on whether the provision is one that allocates power between the federal and state governments.

a. A test for rights based on power allocation is inconsistent with the test this Court has specifically fashioned for determining what constitutes a "right" for purposes of § 1983. Under this Court's test, which it summarized in *Golden State Transit Corp. v. City of Los Angeles*, 110 S. Ct. at 448, it is clear that the Commerce Clause secures rights within the meaning of § 1983 because it imposes specific obligations on states and because the interests of persons invoking the protections of the Clause are not "beyond the competence of the judiciary to enforce" (*Wright v. Roanoke Redevelopment and Housing Authority*, 479 U.S. 418, 432 (1987)), as numerous cases enforcing those protections attest.

b. This Court has expressly rejected a test for rights based on power allocation. Most recently, in *United States v. Munoz-Flores*, 58 U.S.L.W. 4563 (1990), the Court held that the Origination Clause of Article I, § 7, which requires revenue measures to originate in the House of Representatives, is a source of individual rights and specifically rejected the Government's contention to the contrary. *See also Davis v. Michigan*

Department of Treasury, 109 S. Ct. 1500 (1989), rejecting the contention that the intergovernmental tax immunity doctrine is not a source of individual rights. Many other decisions of this Court have similarly upheld individual rights based on power-allocating provisions or doctrines, such as the separation of powers doctrine, the principle of bicameralism and the requirements of Article III.

c. Contrary to the view of the Eighth Circuit in *Consolidated Freightways Corp. v. Kassel*, 730 F.2d at 1145-1146, the legislative history of § 1983 does not support the conclusion that the statute does not apply to violations of the Commerce Clause. The Eighth Circuit's view that Congress intended § 1983 to apply only to "important" rights "akin to fundamental rights protected by the Fourteenth Amendment" was expressly rejected by this Court in *Lynch v. Household Finance Corp.*, 405 U.S. 538 (1972), and *Maine v. Thiboutot*, 448 U.S. 1 (1980). The brief remarks of Rep. Shellabarger on which the Eighth Circuit relied do not appear to have concerned the scope of what became § 1983 and did not refer to the Commerce Clause. His remarks cannot in any event overcome the plain language of the statute and this Court's consistent decisions construing it.

ARGUMENT

PETITIONER'S CLAIM FOR INJUNCTIVE RELIEF AGAINST STATE TAXES THAT DISCRIMINATE IN VIOLATION OF THE COMMERCE CLAUSE STATES A CLAIM UNDER 42 U.S.C. § 1983

Before turning to the merits, it is important to identify what issues are and what issues are not before the Court in this case.

The only issue that is before the Court to decide is whether 42 U.S.C. § 1983 provides a remedy to persons who are injured by a state's violation of the Commerce Clause. Whether or not Nebraska's retaliatory taxes did in fact violate the Commerce Clause is not at issue. The trial court held that they did violate the Commerce Clause, and since respondents did not appeal that ruling to either the Nebraska Supreme Court or to this Court, the violation of the Commerce Clause must be taken as a given for purposes of resolving the issue in this case.[6]

The § 1983 issue is important principally for purposes of petitioner's entitlement to costs and attorney's fees under the portion of the Civil Rights

---

[6] Petitioner, of course, believes that the trial court's ruling was clearly correct under this Court's Commerce Clause jurisprudence, as six other state supreme courts have concluded in striking down similar retaliatory truck taxes (*see* note 3, *supra*) and as this Court itself appeared to acknowledge in *American Trucking Associations, Inc. v. Scheiner*, 483 U.S. 266, 286 (1987). Any questions one might have about the Court's Commerce Clause jurisprudence, however, (*see, e.g.*, Justice Scalia's dissent in *Scheiner* (483 U.S. at 303-306)) should have no bearing on the issue in this case. The only issue here is, if a state does violate the Commerce Clause as that Clause has been applied by this Court, whether § 1983 provides a remedy to a person who is injured by that violation. For purposes of that issue the Commerce Clause violation, which the state has not appealed, must be assumed. The issue presented here is analogous to the issue presented in *McKesson Corp. v. Florida Division of Alcoholic Beverages and Tobacco*, 110 S. Ct. 2238 (1990), in which the Court unanimously held that when a state exacts a tax that is later struck down as a violation of the dormant Commerce Clause, the state is constitutionally obligated to refund the taxes collected or prove some other form of retroactive relief. *See also Ashland Oil, Inc. v. Caryl*, No. 88-421 (U.S. June 28, 1990).

Attorney's Fees Awards Act of 1976, Pub.L. 94-559, 90 Stat. 2641, codified as 42 U.S.C. § 1988.[7] However, while the implications of the § 1983 issue for attorney's fees and costs are important,[8] this case itself presents no issue regarding petitioner's entitlement to fees under 42 U.S.C. § 1988 in the event he is held to have a claim under § 1983. That is so because the Nebraska Supreme Court expressly recognized that petitioner would be entitled to attorney's fees and costs under § 1988 if he had stated a cognizable claim under § 1983 even if relief were actually granted on other grounds. Thus, it stated: "[A] party who prevails on a ground other than § 1983 is entitled

---

[7] Section 1983 is not available to obtain damages in this case because *Will v. Michigan Department of State Police*, 109 S. Ct. 2304 (1989), held that neither states nor state officials sued for monetary relief in their official capacities were "persons" subject to suit under § 1983 and because petitioner has not sought damages from respondents in their individual capacities, which would require a showing of bad faith on their part in the enforcement of the challenged tax statutes. Nor was § 1983 needed for injunctive relief, since such relief was available under state law. Injunctive relief under § 1983 was clearly available, however, because, as *Will* and other cases have made clear, state officials sued in their official capacities for injunctive relief are persons subject to suit under § 1983. *See* 109 S. Ct. at 2311, n.10.

[8] As discussed more fully in the Petition For a Writ of Certiorari at 13-15, the ability of litigants like petitioner to recover attorney's fees and litigation costs under 42 U.S.C. § 1988 is extremely important and in some cases essential to effectively protecting the rights of individuals and the interests of the public in the free flow of interstate commerce. In a case such as this one, where a discriminatory state tax imposes costs on individual taxpayers which would not justify the expense of a separate lawsuit, the ability to recover fees and costs from the taxing authority will often provide the only practical means for challenging the tax.

to attorney fees under § 1988 if § 1983 would have been an appropriate basis for relief." (Pet. App. 5a, citing cases). *See also Maher v. Gagne*, 448 U.S. 122, 132 n.15 (1980); *Maine v. Thiboutot*, 448 U.S. at 10-11.[9]

With respect to the single issue presented here, petitioner submits that the decision below erred in concluding that state violations of the Commerce Clause are not cognizable under § 1983. As discussed in the arguments that follow, this Court's decisions establish that § 1983 is to be broadly construed to provide redress for deprivations of *all* constitutional and federal statutory rights, and Congress has not chosen to cut back those decisions by restricting § 1983 to some subset of rights. Furthermore, the Court has consistently held that the Commerce Clause gives rise to personal, enforceable rights; the contrary conclusion of the Nebraska Supreme Court is at odds with almost two centuries of Commerce Clause decisions. Finally, the conclusion of the decision below that constitutional provisions allocating governmental powers may not also create rights in individuals which they may enforce is (1) inconsistent with the test this Court has established for determining what are "rights" enforceable under § 1983, (2) unworkable, (3) contrary to many decisions upholding individual rights based on power allocating provisions, and

[9] Accordingly, this case does not involve the issues presented in *Oregon State Police Officers Association v. Oregon*, 766 P.2d 408 (Or. Ct. App. 1988), *petition for cert. filed*, 58 U.S.L.W. 3727 (U.S. Apr. 11, 1990) (No. 89-1604) and *Gonzales v. New Mexico Educational Retirement Board*, 788 P.2d 348 (N.M.), *petition for cert. filed*, 59 U.S.L.W. 3002 (U.S. June 4, 1990) (No. 89-1892).

(4) wholly unsupported by the legislative history of §§ 1983 and 1988.

I. 42 U.S.C. § 1983 Provides A Remedy For State Deprivations of *All* Constitutional Rights, and Congress Has Not Limited The Broad Scope This Court Has Given To § 1983.

42 U.S.C. § 1983 provides in pertinent part: "Every person who, under color of any statute . . . of any State . . . causes to be subjected, any citizen of the United States . . . to the deprivation of *any* rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." (Emphasis supplied).

This Court has "repeatedly held that the coverage of [§ 1983] must be broadly construed." *Golden State Transit Corp. v. City of Los Angeles*, 110 S. Ct. 444, 448 (1989). In accordance with that principle, it has consistently rejected efforts to limit the scope of the rights to which § 1983 applies. For example, in *Lynch v. Household Finance Corp.*, 405 U.S. 538, 542 (1972), the Court rejected the argument that the phrase "right, privilege, or immunity secured by the Constitution" was intended to apply only to personal rights, not property rights, secured by the Constitution.[10] The Court held that the version of the phrase that appears in 18 U.S.C. § 242 "embrace[s] '*all* of

[10] This phrase is similar to the language that appears in § 1983. It is part of 28 U.S.C. § 1343(3), the jurisdictional counterpart of § 1983, and a similar version also appears in 18 U.S.C. § 242. *Lynch* specifically involved an interpretation of § 1343(3), but the Court, in discussing its broad scope, noted expressly that similar language was employed in § 1983 and in § 1343(3). 405 U.S. at 543, n.7.

the Constitution and laws of the United States.' " *Id.* at 549 n.16 (quoting *United States v. Price*, 383 U.S. 787, 797 (1966) (emphasis in original). Similarly, in *Maine v. Thiboutot*, 448 U.S. 1 (1980), the Court rejected the contention that § 1983 provided redress only for State violations of federal laws pertaining to civil rights or equal protection, and it upheld the respondents' § 1983 claim based on the State's alleged violation of the Social Security Act, as well as their related claim for attorney's fees under § 1988. The Court stated: "Given that Congress attached no modifiers to the phrase, the plain language of the statute undoubtedly embraces respondents' claim that petitioners violated the Social Security Act." *Id.* at 4. Most recently, in *Golden State Transit*, the Court upheld a § 1983 cause of action based on the claim that a city's action was preempted by the National Labor Relations Act, 29 U.S.C. § 151 *et seq.* 110 S. Ct. at 451-452.

The decision below is distinctly at odds with this Court's broad view of the scope of § 1983. In effect it seeks to carve an exception out of § 1983 similar to those rejected in *Lynch, Thibotout* and other cases—*i.e.*, an exception for certain types of constitutional violations.

There is no warrant for such a judicial rewriting of § 1983. If Congress disagreed with this Court's broad and unqualified view of § 1983 or wished to limit the scope of § 1983 to some subset of constitutional or statutory rights or to limit the types of claims for which attorney's fees are available under § 1988, it has had ample opportunity over the past several decades to revise those statutes accordingly. In fact, the only change Congress has made to § 1983

since its original enactment was to *broaden* the scope of the statute when, in 1979, it amended § 1983 to encompass actions under color of the statutes, ordinances, etc. of the District of Columbia as well as those of the states and territories. Pub. L. 96-170, 93 Stat. 1284 (1979).[11] The fact that it has chosen not to restrict in any way this Court's broad construction of § 1983 militates strongly against fashioning judicial exceptions to the scope of the statute. As this Court said in *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 736 (1977): "[C]onsiderations of *stare decisis* weigh heavily in the area of statutory construction, where Congress is free to change this Court's interpretation of its legislation." For that reason, this Court has consistently declined to change long-standing statutory constructions, and it should decline to do so here. *See, e.g., Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 58 U.S.L.W. 4862 (1990); *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409, 420 (1986).

II. This Court's Decisions Have Consistently Recognized That The Commerce Clause Secures Personal, Enforceable Rights.

The conclusion of the Nebraska Supreme Court that the Commerce Clause does not secure individual constitutional rights is also squarely in conflict with numerous decisions of this Court. Like the other courts that have reached the same conclusion, the Nebraska Supreme Court followed and relied primarily on the

---

[11] This amendment was enacted to overrule this Court's decision in *District of Columbia v. Carter*, 409 U.S. 418, 419 (1973), which held that the District of Columbia was not a "State or Territory" within the meaning of § 1983. H.R. Rep. No. 548, 96th Cong., 1st Sess. 2 (1979).

reasoning of the Eighth Circuit in *Consolidated Freightways Corp. v. Kassel*, which rejected Consolidated Freightways's claim against Iowa under §§ 1983 and 1988 after this Court struck down an Iowa statute limiting truck lengths as a violation of the Commerce Clause.[12] The Eighth Circuit reasoned:

> [T]he Commerce Clause does not establish individual rights against government, but instead allocates power between the state and federal governments.
>
> • • •
>
> It is clear from the language employed by the Supreme Court in Commerce Clause cases that the Commerce Clause deals with the relationship between national and state interests, not the protection of individual rights.
>
> • • •
>
> Although individuals are oftentimes benefited through the indirect protection resulting from the limitations placed on the states through the dormant Commerce Clause doctrine, such benefit is not the same thing as a "right" secured by the Constitution within the meaning of § 1983.

730 F.2d at 1144, 1145. The same sentiment is echoed in other decisions that have followed *Kassel*. *See, e.g., J & J Anderson, Inc. v. Town of Erie*, 767 F.2d 1469, 1476 (10th Cir. 1985) ("[T]he Commerce Clause deals with the relationship between national and state interests, and does not deal with the protection of individual rights."); *Kraft v. Jacka*, 872 F.2d 862, 869 (9th Cir. 1989).

[12] *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662 (1981).

The fallacy in the view expressed in the foregoing decisions is the assumption that constitutional provisions can serve only one function—that they either allocate power or secure individual rights, but cannot do both. In fact, as will be shown, this Court's decisions make clear that many constitutional provisions, including the Commerce Clause, serve both functions, and that provisions allocating powers among governmental entities normally do so *in order* to secure individual rights and liberties.

Contrary to the views expressed in *Kassel*, this Court's Commerce Clause decisions leave no doubt that that Clause not only restricts the power of the States over interstate commerce but also creates a right in individuals to engage in interstate commerce free of discriminatory and protectionist state taxation and regulation. As discussed more fully at pp. 22-26, *infra*, this Court's decisions have regarded as a personal "right" any legal protection, privilege or immunity that an individual is permitted (*i.e.*, has standing) to enforce through the processes of the courts. At least since it entertained Mr. Gibbons's Commerce Clause defense against Mr. Ogden's attempt to enforce his New York state-granted monopoly over Hudson River navigation,[13] this Court has not only recognized the ability of individuals to enforce personal protections based on the Commerce Clause through the judicial process but also has spe-

[13] *Gibbons v. Ogden*, 22 U.S. (9 Wheat) 1 (1824).

cifically *described* the Commerce Clause has having secured personal rights.

In *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318, 320 n.3 (1977), for example, the Court held that certain stock exchanges had standing to challenge a New York tax that discriminated against them and their members, stating (emphasis supplied): "The Exchanges are asserting *their right under the Commerce Clause* to engage in interstate commerce free of discriminatory taxes on their business . . . ." Similarly, in *Garrity v. New Jersey*, 385 U.S. 493, 500 (1967), the Court stated: "There are rights of constitutional stature whose exercise a State may not condition by the exaction of a price. Engaging in interstate commerce is one. *Western Union Tel. Co. v. State of Kansas*, 216 U.S. 1, 30 S. Ct. 190, 54 L.Ed. 355." In these and many other cases, the Court has used and understood the term "right" to mean any legal privilege or protection which a person may enforce by judicial action.

The personal nature of the rights secured by the Commerce Clause is perhaps most dramatically illustrated by this Court's landmark civil rights decisions which struck down racially discriminatory state laws as violations of the Commerce Clause. In *Morgan v. Virginia*, 328 U.S. 373 (1946), the Court upheld an individual bus passenger's Commerce Clause challenge to a Virginia statute requiring racial segregation on interstate buses. Significantly, the Court rejected a challenge to the passenger's standing to invoke the Commerce Clause; the Court stated:

> We think . . . that the appellant is a proper person to challenge the validity of this statute as a burden on commerce . . . . *Constitutional protection against burdens on commerce is for her benefit* on a criminal trial for violation of the challenged statute.

Id. at 376-377 (emphasis supplied, footnote omitted). *Accord, Bailey v. Patterson*, 369 U.S. 31 (1962). *See also Edwards v. California*, 314 U.S. 160 (1941), and *United States v. Guest*, 383 U.S. 745, 757-760 (1966), recognizing a "constitutional right to travel from one State to another" based on the Commerce Clause.[14] Although they were cited to it, the Nebraska Supreme Court made no reference in its opinion to the foregoing decisions of this Court, and its ruling that the Commerce Clause does not secure personal rights simply cannot be reconciled with them.[15]

---

[14]Very recently this Court again showed that the Commerce Clause does more than merely allocate power among state and federal governments and that it also secures tangible, enforceable rights in individuals. In *McKesson Corp. v. Florida Division of Alcoholic Beverages and Tobacco*, 110 S. Ct. 2238 (1990), the Court unanimously held that when a State exacts a discriminatory tax that is later struck down as in violation of the Commerce Clause, the taxpayers are entitled to retroactive relief, either in the form of refunds of the taxes collected or in any other way that can effectively remedy the discrimination to which the taxpayers was subjected.

[15] In *Consolidated Freightways Corp. v. Kassel*, the Eighth Circuit dismissed some of the cited statements—those in *Garrity v. New Jersey* and *Western Union Tel. Co. v. Kansas*—as either "mere dictum" or as "not dealing with the question of whether the Commerce Clause secures rights within the meaning of 1983." 730 F.2d at 1145. However, neither the Eighth Circuit nor any other decision following *Kassel* discussed *Boston Stock Exchange v. State Tax Commission*, *Morgan v. Virginia*, *Bailey v. Patterson*, *Edwards v. California*, or *United States v. Guest*, in all of which the recognition of personal rights under the

It is true that the Commerce Clause grants power to Congress and restricts the powers of the states, but in doing so it also provides important protections to individuals which they have been able to enforce through the courts—protections which this Court has therefore naturally and consistently described as "rights" under the Commerce Clause. These rights are as fundamental to our constitutional system as any secured by the Constitution. To deny them would, in the words of Justice Cardozo, "invite a speedy end of our national solidarity." *Baldwin v. G.A.F. Seeling, Inc.*, 294 U.S. 511, 523 (1935). To individuals such as petitioner, moreover, his right to conduct his trucking business among the states free from discriminatory state taxes or other laws is as important as any other right the Constitution secures to him, since his very livelihood depends on it.

III. Whether A Constitutional Or Statutory Provision Establishes A "Right" That Is Enforceable Under § 1983 Does Not Turn On Whether The Provision Allocates Governmental Powers.

1. The Test Employed In The Decision Below Is Inconsistent With The Test This Court Has Fashioned For Determining What Constitutes "Rights" Enforceable Under § 1983.

There is no merit to the notion, employed by the Eighth Circuit in *Kassel* and adopted by the court below, that a constitutional provision like the Commerce Clause does not secure personal "rights" be-

---

Commerce Clause was clearly not dictum. Moreover, the fact that the Court's recognition of such rights was not specifically in connection with § 1983 is plainly immaterial. There is no rational basis for concluding that the Commerce Clause secures "rights" for some purposes but not for purposes of § 1983.

cause it merely allocates governmental powers. As discussed *infra* at 26-29, such a notion is refuted by many decisions of this Court that have upheld individual rights on the basis of similar "power-allocating" provisions, and it would embark the courts on a fruitless mission of trying to fashion distinctions among constitutional provisions that are ultimately unworkable. Specifically with respect to § 1983, moreover, the notion is inconsistent with the test this Court has fashioned for determining what constitutes "rights" that are enforceable under § 1983.

Whether or not a constitutional or statutory provision secures a "right" within the meaning of § 1983 is not an issue that is new to this Court. The Court has addressed this precise issue in a number of decisions, which it recently reviewed in *Golden State Transit Corp. v. City of Los Angeles* and summarized as follows:

> A determination that § 1983 is available to remedy a statutory or constitutional violation involves a two-step inquiry. First, the plaintiff must assert the violation of a federal right. *See Middlesex County Sewerage Authority v. National Sea Clammers Assn.*, 453 U.S. 1, 19 (1981). Section 1983 speaks in terms of "rights, privileges, or immunities," not violations of federal law. In deciding whether a federal right has been violated, we have considered whether the provision in question creates obligations binding on the governmental unit or rather "does no more than express a congressional preference for certain kinds of treatment." *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 19 (1981).

> The interest the plaintiff asserts must not be "too vague and amorphous" to be "beyond the competence of the judiciary to enforce." *Wright v. Roanoke Redevelopment and Housing Authority*, 479 U.S. 418, 431-432 (1987). We have also asked whether the provision in question was "inten[ded] to benefit" the putative plaintiff. *Id.*, at 430; *see also id.*, at 433 (O'Connor, J., dissenting) (citing *Cort v. Ash*, 422 U.S. 66, 78 (1975)).

110 S. Ct. at 448.[16]

Golden State Transit and the other decisions cited therein reflect the view that the question whether a provision establishes an individual right is essentially the same question as whether it creates a protection, privilege or immunity that is judicially enforceable by that individual. That question, in turn, embraces two subsidiary questions: first, whether the provision in question imposes specific obligations on the governmental unit as opposed to merely stating precatory exhortations or general preferences, and second, whether the individual has standing to invoke the provision in question.

Under the formulation set forth in *Golden State Transit* there can be no serious doubt that the Commerce Clause secures rights within the meaning of § 1983. It has been a fundamental precept of constitutional jurisprudence since *Cooley v. Board of Port Wardens of Port of Philadelphia*, 53 U.S. (12 How.) 299 (1851), that the Commerce Clause imposes specific obligations on the States.[17] These obligations include, among other things, refraining from discriminating in their taxing systems against interstate commerce and out-of-state businesses. *See, e.g., Guy v. Baltimore*, 100 U.S. 434 (1879) (striking down city wharfage fee imposed only on ships carrying out-of-state goods). Furthermore, the interests asserted by those who have invoked the protection of Commerce Clause are obviously not so "vague and amorphous" as to be "beyond the competence of the judiciary to enforce," since the courts have consistently enforced them throughout the history of the United States.[18]

---

[16] The Court went on to explain that the second step of the inquiry was whether Congress " 'specifically foreclosed a remedy under § 1983.' " 110 S. Ct. at 448 (quoting *Smith v. Robinson*, 468 U.S. 992, 1005, n.9 (1984)). This part of the inquiry is not pertinent to this case. Respondents have never suggested that Congress by statute has foreclosed a § 1983 remedy for Commerce Clause violations, and there would be no basis for such a claim.

[17] As the Court said in *A&P Tea Co. v. Cottrell*, 424 U.S. 366, 370-371 (1976): "[A]t least since *Cooley v. Board of Wardens*, 12 How. 299 (1852), it has been clear that 'the Commerce Clause was not merely an authorization to Congress to enact laws for the protection and encouragement of commerce among the States, but by its own force created an area of trade free from interference by the States. . . . [T]he Commerce Clause even without implementing legislation by Congress is a limitation upon the power of the States.' " (Quoting *Freeman v. Hewit*, 329 U.S. 249, 252 (1946)).

[18] The fact that the Commerce Clause itself does not expressly state or describe the obligations and restraints it imposes on the States is not material. As the Court stated in *Golden State Transit:* "A rule of law that is the product of judicial interpretation of a vague, ambiguous or incomplete statutory provision is no less binding than a rule that is based on the plain meaning of a statute. The violation of a federal right that has been found to be implicit in a statute's language and structure is as much

It is also well settled that individuals injured by state violations of those obligations have standing to enforce those obligations in court. Such standing has not only been implicit in all dormant Commerce Clause actions successfully brought by businesses and individuals; this Court expressly affirmed it in *Boston Stock Exchange v. State Tax Commission* when it rejected a challenge to the standing of the plaintiff exchanges to contest the taxes at issue and stated that "the Exchanges have standing under the two-part test of *Data Processing Service v. Camp*, 397 U.S. 150 (1970). . . . The Exchanges are asserting their right under the Commerce Clause to engage in interstate commerce free of discriminatory taxes on their business. . . ." 429 U.S. at 320 n.3. Indeed it was a contradiction in terms for the Nebraska courts to uphold petitioner's standing to seek declaratory and injunctive relief against Nebraska's retaliatory tax and to uphold his claim under the Commerce Clause on the merits and issue the requested relief, and yet to conclude that the Commerce Clause secured no rights to petitioner. How can a person have standing to assert and obtain relief with respect to rights he does not possess?

2. A Test For Rights Based On Power Allocation Would Be Unworkable And Contrary To Many Decisions Upholding Individual Rights Based On Power Allocating Provisions.

Furthermore, contrary to the conclusion of the court below and other courts that have adopted the Eighth Circuit's rationale in *Kassel*, whether or not a constitutional provision allocates power among governmental entities is neither a rational nor a workable basis for determining whether that provision secures individual "rights" for purposes of § 1983 or for any other purpose. Indeed this Court has specifically rejected such a basis for determining individual rights in several cases, most recently in *United States v. Munoz-Flores*, 58 U.S.L.W. 4563 (1990). In that case a criminal defendant challenged the fine imposed on him on the ground that the statute authorizing the fine was a revenue measure which originated in the Senate in violation of the Origination Clause of Article I, § 7, which requires all revenue bills to originate in the House of Representatives. The Government argued, among other things, that the defendant had no claim because the Origination Clause merely allocates powers among the houses of Congress and thus "does not involve individual rights." *Id.* at 4566. The Court rejected this argument, stating:

> [T]he Government's claim that compliance with the Origination Clause is irrelevant to ensuring individual rights is in error. This Court has repeatedly emphasized that " 'the Constitution diffuses power the better to secure liberty.' " *Morrison* [*v. Olson*, 487 U.S. 654], *supra*, at 694 (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring)). *See also Morrison, supra*, at 697 (Scalia, J., dissenting) ("The Framers of the Federal Constitution . . . viewed the principle of separation of powers as the absolutely central guarantee of a just government"). Recognizing this, the

---

a 'direct violation' of a right as is the violation of a right that is clearly set forth in the text of the statute." 110 S. Ct. at 451.

> Court has repeatedly adjudicated separation of powers claims brought by people acting in their individual capacities.

Id. (citation omitted).

Similarly, in *Davis v. Michigan Department of Treasury*, 109 S. Ct. 1500 (1989), the Court expressly rejected the contention that constitutional provisions allocating power between the state and federal governments cannot also give rise to personal constitutional rights. In that case, the State argued that a taxpayer could not seek a tax refund on the basis of the doctrine of intergovernmental tax immunity because the asserted purpose of the doctrine was "to protect governments and not private entities or individuals." *Id.* at 1507. In holding that an individual *could* maintain such a claim, the Court stated:

> It is true that intergovernmental tax immunity is based on the need to protect each sovereign's governmental operations from undue interference by the other. But it does not follow that private entities or individuals who are subjected to discriminatory taxation on account of their dealings with a sovereign cannot themselves receive the protection of the constitutional doctrine. Indeed, all precedent is to the contrary.

Id. (citations omitted).

As the Court noted in *Munoz-Flores* and *Davis*, the notion that power allocating provisions cannot create individual rights is contrary to many other decisions of this Court that have found and enforced individual rights based on constitutional provisions and doctrines that allocate governmental powers or otherwise deal

with the structure of government. In addition to those enforcing rights under the Commerce Clause discussed *supra* at 20-22, these include, for example, *Bowsher v. Synar*, 478 U.S. 714, 721 (1986), in which the Court upheld the claim of a government employee that the Gramm-Rudman-Hollings Act, Pub. L. 99-177, 99 Stat. 1038, violated the separation of powers doctrine because it gave Congress power to remove the executive officer charged with administering the Act and would therefore unconstitutionally deprive the plaintiff of his right to a scheduled salary increase. Similarly, in *INS v. Chadha*, 462 U.S. 919, 951 (1983), the Court upheld the right of an individual not to be deported pursuant to a one-house veto provision in a statute that the Court held to contravene the President's constitutional role in legislation and the principle of bicameralism. In *Northern Pipeline Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 87 (1982), the Court sustained the claim of a litigant that the Bankruptcy Act of 1978, Pub. L. 95-598, 92 Stat. 2549, violated the requirements of Article III because bankruptcy judges appointed under the Act exercised judicial power without life tenure. All of these decisions refute the conclusion of the Supreme Court of Nebraska that the Commerce Clause does not secure individual rights because it allocates powers among the state and federal governments.

Finally, the test for individual rights employed by the court below, if adopted, would embark the courts on an exercise very similar to the one this Court noted and disapproved in *Lynch v. Household Finance*, when it rejected the contention, adopted by some courts, that the phrase "any right, privilege or immunity secured by the Constitution" appearing in

28 U.S.C. § 1343(3) applied only to "personal rights" and not to "property rights." The Court aptly observed:

> A final, compelling reason for rejecting a "personal liberties" limitation upon § 1343(3) is the virtual impossibility of applying it. The federal courts have been particularly bedeviled by "mixed" cases in which both personal and property rights are implicated, and the line between them has been difficult to draw with any consistency or principled objectivity.

405 U.S. at 550-551 (footnotes omitted).

The same would surely be true if the courts were required to draw distinctions among constitutional provisions based on whether or not they allocated governmental powers. Such a distinction, if accepted, could plausibly be argued to deny individuals' rights based on a host of constitutional provisions, including, for example, all of the powers of Congress in Article I, Section 8, and all of the restrictions in Article I, Section 10 upon states, such as those prohibiting bills of attainder, *ex post facto* laws, laws impairing contracts, and duties on exports and imports. It could even be argued to preclude a determination of personal rights based on the First and Fourteenth Amendments because they are phased in terms of limitations on the powers of Congress and the states. As this Court has held, however, there is no principled basis for such a distinction, and many power allocating provisions, including the Commerce Clause, have been held also to secure individual rights.

In reaching the contrary conclusion, the court below and the Eighth Circuit in *Kassel* erroneously analogized the Commerce Clause to the Supremacy Clause. The Supremacy Clause, however, is very different from the Commerce Clause, and indeed, from any other provision of the federal Constitution. The Supremacy Clause is merely a declaration of the supremacy of the federal Constitution and federal laws over state laws; as this Court noted in *Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600, 613 (1979), it is not itself "a source of any federal rights." *See also Golden State Transit Corp. v. City of Los Angeles*, 110 S.Ct. at 449.[19] The Commerce Clause, in contrast, clearly *is* a "source of . . . federal rights" which individuals may enforce, and in that respect it is no different from the Ex Post Facto Clause or the Bill of Attainder Clause or any other substantive limitation on the power of states contained in the Constitution. Since those are all limitations that individuals may personally enforce by judicial action, each of those clauses can only be regarded as establishing personal constitutional "rights."

3. The Legislative History of § 1983 Does Not Support The View That The Commerce Clause Does Not Create Rights Enforceable Under § 1983.

Although the decision below did not discuss or rely on the legislative history of § 1983, the Eighth Circuit

---

[19] As *Golden State Transit* demonstrates, however, whether or not the Supremacy Clause itself secures "rights" enforceable under 1983 is largely inconsequential, because the Supremacy Clause is pertinent only when a claimant invokes some other federal constitutional or statutory provision as assertedly superior to some state law. When those other provisions are found to establish enforceable rights, as the National Labor Relations Act was found to do in *Golden State Transit*, it is irrelevant whether the Supremacy Clause also secures such rights.

in *Kassel* concluded that that history supported its view that § 1983 was not intended to provide redress for state violations of the Commerce Clause. The Eighth Circuit concluded that the history of § 1983 showed Congress intended that "the type of rights protected by § 1983 are 'important personal rights akin to fundamental rights protected by the Fourteenth Amendment.' " 730 F.2d at 1146 (quoting *First National Bank of Omaha v. Marquette National Bank of Minneapolis*, 636 F.2d 195, 198 (8th Cir. 1980), *cert. denied*, 450 U.S. 1042 (1981)). The Eighth Circuit also cited some floor remarks of Rep. Shellabarger, a leading proponent of the Civil Rights Act of 1871, ch. 22, 17 Stat. 13, a portion of which is now codified as § 1983, which seem to distinguish between constitutional provisions which "relate to the divisions of the political powers of the State and General Governments" and those which "relate directly to the rights of persons within the States and as between the States and such persons therein." 730 F.2d at 1146 n.16 (quoting Cong. Globe, 42d Cong., 1st Sess., App. 69 (1871)).

The Eighth Circuit's view of the history and purpose of § 1983 as it relates to Commerce Clause violations is incorrect for several reasons. First, as discussed earlier, the Commerce Clause does secure "important personal rights akin to fundamental rights protected by the Fourteenth Amendment." *Morgan v. Virginia* and other cases cited at pp. 20-21, *supra*, establish as much. Establishing the right of Americans to travel and conduct business throughout the United States free from burdensome and protectionist state laws was one of the chief purposes of the Constitution, and it is as fundamental as any of the liberties the Constitution secures to us.

Second, this Court in *Lynch v. Household Finance* and *Maine v. Thiboutot* squarely rejected the notion that Congress intended to limit § 1983 to some subset of constitutional or statutory rights—*e.g.*, "important" rights, or rights "akin" to those protected by the Fourteenth Amendment. Those decisions and others have thoroughly reviewed the legislative history of § 1983 and related provisions and have concluded that that history provides no basis for limiting § 1983 to some subset of rights but instead fully supports a broad construction consistent with the unqualified language of the statute. *See Maine v. Thiboutot*, 448 U.S. at 6-8; *Lynch v. Household Finance Corp.*, 405 U.S. at 543-550; *United States v. Price*, 383 U.S. 787, 801-807 (1966).

Finally, Rep. Shellabarger's remarks do not warrant a contrary conclusion. First, the quoted remarks do not appear to have been expressing any view concerning the scope of the bill that became § 1983. Second, those remarks make no reference to the Commerce Clause, and there is no basis for the Eighth Circuit's speculation that Rep. Shellabarger would not have classified personal rights under the dormant Commerce Clause as falling within "the rights of persons within the States and as between the States and such persons therein." Third, even if Rep. Shellabarger's remarks did reflect the view that § 1983 does not encompass all provisions of the Constitution or that provisions relating to the division of governmental powers do not establish personal rights, the language of the statute as enacted and this Court's consistent decisions are to the contrary. At best, Rep.

Shellabarger's comments represent a "fragment[ ] of legislative history" which hardly amounts to "a clearly expressed legislative intent contrary to the plain language of the statute." *American Tobacco Co. v. Patterson*, 456 U.S. 63, 75 (1982) (citation omitted). *See also Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 118 (1980), declining to give weight to the "isolated remark" of the sponsor of legislation.

In sum, the legislative history of 1983 does not support the decision below.

CONCLUSION

The judgment of the Supreme Court of Nebraska should be reversed.

Respectfully submitted,

RICHARD A. ALLEN
Counsel of Record
KENNETH S. NANKIN
ZUCKERT, SCOUTT & RASENBERGER
888 Seventeenth Street, N.W.
Suite 600
Washington, DC 20006
202/298-8660

RICHARD L. SPANGLER, JR.
WOODS & AITKEN
1500 American Charter Center
206 South 13th Street
Lincoln, NE 68508
402/474-0321

July 13, 1990